



FEDERAL ELECTION COMMISSION
Washington, DC 20463

February 11, 2000

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1999-37

Michael J. Panetta, Executive Director
X-PAC
3509 Connecticut Avenue, NW #175
Washington, DC 20008

Dear Mr. Panetta:

This refers to your letters dated November 11 and October 18, 1999, on behalf of X-PAC: The Political Action Committee for Generation X ("X-PAC") concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to X-PAC's proposed political advertising that would promote use of the Internet to make independent expenditures.

FACTS

You are the executive director of X-PAC which has created several political advertisements or communications in various electronic formats. These communications have content that advocates the election or defeat of specific candidates for Federal office. You explain that they were made without consultation with any candidate's campaign or committee, and you assert that the advertisements would be considered "independent expenditures" under the Act. You further state that these advertisements are "native" to the Internet in that they were created specifically for electronic distribution and were never intended to be shown or presented as "paid media" on either television or radio.

In addition, you explain that these communications, were developed "in-house" by X-PAC using commercially available software and will be hosted on its web site at no

additional cost beyond what the committee has previously reported.¹ You characterize the costs for the making and hosting of these ads as “very minimal.”

X-PAC plans to distribute these ads through the Internet in two ways: downloading from the X-PAC website (www.x-pac.org) and through electronic mail. You state that X-PAC will choose the e-mail addresses to which it will send the ads in several ways. On its website (<http://www.x-pac.org>), X-PAC currently has a section where site visitors can subscribe to the X-PAC e-mail lists. These people have indicated they would like to receive additional material from X-PAC when it is available. You state that X-PAC will send its advertisements as e-mail attachments to these addresses. You further explain that there are various bulletin boards that discuss politics on the Internet. Examples include Usenet newsgroups such as “*altpolitics*.” Using these groups, X-PAC would not actually send the advertisement file content to the newsgroup, but would instead post a text message describing the advertisement with a link back to the advertisement hosted on the X-PAC web site. As resources permit, X-PAC will also promote its website through traditional paid print media and on the Internet, with banner advertisements that will link back to X-PAC's web page.

A large part of this venture will be to encourage the viewers of these advertisements to forward them to others through their own e-mail accounts and with a "send this ad to a friend" link on the X-PAC website. You explain that while these files can be accessed via the X-PAC website, they also can be viewed “independently of the Internet.” Users will create a copy of the communication on to their own computers, and would then use their own e-mail accounts to forward it to others.

You ask several questions about the described proposal:

1. Considering the minimal costs involved in the making and hosting of these ads, what does the Commission need to see in terms of financial documentation?
2. Is it sufficient to report the cost of the advertisement once as an independent expenditure made by X-PAC, or does X-PAC have to multiply that cost by the number of times the advertisement was downloaded from the web site?
3. Does each e-mail X-PAC sends with one of the described advertisements need to be reported as a separate independent expenditure?

¹ These communications will be in executable programs for Microsoft Windows operating systems (.exe) and Real Media files (.ra, .rm, .ram), a proprietary digital media format by Real Networks. The two main software packages used, you state, are “Flash 4” by Macromedia and “Real Converter” by Real Networks. You also state that X-PAC previously reported the expenditures for its domain name (x-pac.org) and for its website hosting.

4. As X-PAC will be encouraging others, via its "send this ad to a friend" link on the X-PAC website, to forward these ads, what type of information does X-PAC need to collect from those who want to forward the ads and about the intended recipients?
5. Will X-PAC need to take any steps to stop non-U.S. citizens from forwarding these ads?

ACT AND COMMISSION REGULATIONS

The definition of "expenditure" in 2 U.S.C. §431(9) includes "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for" Federal office. See also 11 CFR 100.8(a)(1). The definition of "contribution" in 2 U.S.C. §431(8) includes "any gift, subscription, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for" Federal office. See also 11 CFR 100.7(a)(1). An independent expenditure is defined at 11 CFR 100.16 as an expenditure for a communication by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate. See also 2 U.S.C. §431(17) and 11 CFR 109.1(a). An expenditure which does not meet the above standard is considered an in-kind contribution. 11 CFR 109.1(c).

Under 11 CFR 104.3(b)(3)(viii) and 104.4(a) political committees (those not authorized by a candidate) are required to itemize any independent expenditure which by itself or when added to other independent expenditures made to the same payee during the same calendar year, exceeds \$200. Independent expenditures are to be itemized on Schedule E. Independent expenditures of \$200 or less to any one payee do not need to be itemized, though the committee must report the subtotal of those expenditures on Line(b) of Schedule E. See 2 U.S.C. §434(b)(6)(B)(iii). Such a political committee is also required to itemize each payee to whom it makes an expenditure to meet a committee operating expense if that payee has received more than \$200 in the calendar year from the reporting committee; the itemized information shall also include the date, amount and purpose of payment. 2 U.S.C. §434(b)(5)(A); 11 CFR 104.3(b)(3)(i).

Under 11 CFR 106.1(a)(1), expenditures, including independent expenditures, made on behalf of more than one clearly identified Federal candidate shall be attributed to each such candidate according to the benefit reasonably expected to be derived. However, expenditures for rent, personnel, overhead, general administrative, fund-raising, and other day-to-day costs of political committees need not be attributed to individual candidates, unless these expenditures are made on behalf of a clearly identified candidate and the expenditure can be directly attributed to that candidate. 11 CFR 106.1(c)(1).

Whenever any person makes an expenditure to finance communications expressly advocating the election or defeat of a clearly identified candidate or those that solicit any contribution, and does so through various types of mass media (e.g., a broadcasting station) or via “any other type of general public political advertising,” the communication is required to include a statement of sponsorship or disclaimer. 2 U.S.C §441d; 11 CFR 110.11. The disclaimer must clearly state if the communication has been paid for and authorized by a candidate, or the candidate’s authorized political committee. If the communication is not authorized by a candidate (including an authorized political committee of a candidate or its agents), the disclaimer shall clearly state the name of the person who paid for the communication and state that it is not authorized by any candidate or the candidate's committee. 2 U.S.C §441d; see 11 CFR 109.3, 110.11(a)(1). Whenever a political committee (not authorized by a candidate) makes a contribution solicitation through any form of general public political advertising, the solicitation shall clearly state the full name of the committee (or other person) who paid for such communication. 11 CFR 110.11(a)(1)(iv).

The Act and Commission regulations prohibit a foreign national from making a contribution, directly or through any other person in connection with an election to any political office. 2 U.S.C. §441e(a); 11 CFR 110.4(a).² The regulations further provide that this prohibition extends to any expenditure by a foreign national in any United States election. 11 CFR 110.4(a)(1).

APPLICATION TO PROPOSAL

Reporting requirements of expenditure program

Your first three questions relate to the reporting requirements that apply to X-PAC in conducting its independent expenditure program. The last two questions pertain to the possible obligations of X-PAC with respect to others who may join in its program.

Question one relates to the “financial documentation” for the expenditure program in view of its “minimal costs.” In Advisory Opinion 1998-22, the Commission delineated certain expenses which might need to be accounted for in assessing the value of a web site which expressly advocated the election of a candidate and which was created by an individual using equipment and facilities partly owned by an unincorporated business. However, since X-PAC is a political committee, rather than an individual who is making independent expenditures, its situation differs significantly from that of the requester in Advisory Opinion 1998-22. The expenses presented in your factual situation would appear to come within the category of overhead expenses which are required to be reported as operating expenses by the committee. This would include expenses for

² Unlike most of the other provisions of the Act, section 441e applies to any election for any political office, including state and local offices. *United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999) [concluding that Commission interpretations of 2 U.S.C. §441e in both its regulations and an advisory opinion have "consistently interpreted 441e as applicable to federal, state, and local elections since 1976."]

registering and maintaining X-PAC's domain name (x-pac.org) and the website hosting, as well as any costs relating to the purchase and use of computer hardware and software. As overhead, under 11 CFR 106.1(c)(1), X-PAC would not be obligated to report these expenses as part of its independent expenditures, unless they are directly attributed to a particular communication that expressly advocates the election or defeat of a clearly identified candidate.³ Therefore, the Commission acknowledges that the committee may, in fact, have no costs that must be attributed to its independent expenditure program and reported as such under the regulations.

In the event that X-PAC has such expenses, as a political committee, rather than an individual, X-PAC would be required to report them as costs of producing or distributing a communication that represents its independent expenditure activity. In addition, if such expenses exceed \$200 during a calendar year, X-PAC must itemize them and provide the requisite certifications of independence. 2 U.S.C. §434(b)(6)(B)(iii), 11 CFR 104.3(b)(3)(vii)(B).

In response to your second and third questions, any downloading of X-PAC's political advertisements (with content expressly advocating the election or defeat of a clearly identified candidate for Federal office) would not impose reporting obligations on X-PAC since it has no costs or expenses that are directly attributable to downloading by others. However, X-PAC's initial distribution of such advertisements as attachments to e-mail messages that it sends, or as text (or graphic) content of the e-mail itself, would be X-PAC's own communications. Accordingly, they would represent X-PAC's independent expenditures with concomitant reporting obligations if the costs exceed the \$200 calendar year threshold described above.

In addition, X-PAC's e-mails with express advocacy or contribution solicitation content would require the appropriate disclaimer statement under the Act and Commission regulations. 2 U.S.C. §441d; 11 CFR 110.11(a)(1)(iii) & (a)(1)(iv). The disclaimer requirements apply even if X-PAC's expenses do not exceed the \$200 aggregate because the cited provisions mention "an expenditure" for a covered communication without regard to any dollar amount of such expenditure. The Commission notes, however, that the cited regulations have a definition of "direct mailing" for purposes of the disclaimer rules: "*direct mailing* includes any number of substantially similar [in content] pieces of mail but does not include a mailing of one hundred pieces or less by any person." Therefore, although primarily intended to apply with respect to paper document mailings, the Commission concludes that this regulation can be applied to e-mails sent by X-PAC in the following respect. If within calendar year 2000, X-PAC sends e-mails to no more than 100 separate e-mail addresses, and the e-mails have substantially similar content, in either the message text or in any attachments thereto, then the disclaimer requirements discussed herein will not apply to such activity. In contrast, X-PAC e-mails sent in the current calendar year to more than 100 e-mail

³ An example where this might be the case is if X-PAC maintained separate web sites supporting or opposing specific individual candidates. The separate costs to register and maintain the domain name for such a site could be directly related to a candidate.

addresses and with substantially similar content (which includes a covered express advocacy or contribution solicitation message) will require that an appropriate disclaimer be presented in a “clear and conspicuous manner” to give adequate notice to the viewer or reader. 11 CFR 110.11(a)(5).

Informational requirements

Your fourth and fifth questions involve the type of information that X-PAC would be required either to collect or provide regarding its expenditure program. You ask whether X-PAC would be required to collect information from individuals who want to use these ads for their own Internet political activity. The Act and Commission regulations do not require that a political committee or individual making independent expenditures collect information from others who might replicate or utilize that committee’s or person’s political message even if they do so at the committee’s (or individual’s) behest.⁴

Your last question concerns the actions that X-PAC may be required to take regarding the possible use of the express advocacy communications that it sends via e-mails which may be received by foreign nationals. The Commission notes that section 441e does not prohibit the distribution of messages that expressly advocate the election or defeat of a clearly identifiable Federal candidate to a list of recipients that may include foreign nationals. Therefore, the committee would not be required to take any actions regarding the manner in which its election advocacy materials may be used.⁵ You have not indicated that X-PAC’s e-mails would also solicit contributions to Federal, State or local candidates or to X-PAC itself, although the committee’s web site does include a contribution solicitation message. The Commission notes that section 441e prohibits the solicitation by any person of political contributions from a foreign national.⁶

⁴ In Advisory Opinions 1995-9, 1999-9, and 1999-22 the Commission examined the obligation of committees or their vendors to collect information from the committees’ contributors who made contributions through the Internet. These opinions did not suggest similar requirements for those making independent expenditures. Furthermore in Advisory Opinion 1999-17, the authorized committee of a Federal candidate inquired as to its obligation to determine the existence of (and monitor), the web sites of other committees that were independently supporting that Federal candidate or opposing other candidates seeking the same office. The Commission determined there was not such an obligation.

⁵ The Act requires the Commission to respond to “a complete written [advisory opinion] request concerning the application of this Act . . . or a rule or regulation prescribed by the Commission with respect to a specific transaction or activity by the person.” 2 U.S.C. §437f(a)(1). For this reason, any further comment on the activity of third parties would not be an appropriate subject for this advisory opinion. See Advisory Opinion 1999-17.

⁶ In Advisory Opinion 1995-9, the Commission reviewed a political committee’s contribution solicitation message that would appear on its web site and advised that the message should be more explicit with respect to restating the prohibitions of section 441e. See also Advisory Opinions 1999-9 and 1999-22 (dealing with similar language used by Presidential campaign committees).

This response constitutes an advisory opinion concerning the application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

Sincerely,

(signed)
Darryl R. Wold
Chairman

Enclosures (AOs 1999-22, 1999-17, 1999-9, 1998-22, and 1995-9)